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In the Supreme Court of the United States

October Term, 1984

CITY OF CLEVELAND,
Petitioner,

vs.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondent.

IN RE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER THE CITY OF CLEVELAND

WILLIAM B. NORRIS, *Counsel of Record*
DEBORAH A. COLEMAN
ALAN S. KOPIT
HAHN, LOESER, FREEDHEIM, DEAN & WELLMAN
800 National City E. 6th Bldg.
Cleveland, Ohio 44114
(216) 621-0150

JOHN D. MADDOX, *Director of Law*
Department of Law
City of Cleveland
Room 106, City Hall
Cleveland, Ohio 44114
(216) 664-2680
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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PETITIONER'S RESPONSE TO NEW MATERIAL RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

A. CEI ERRS IN STATING THAT THIS CASE INVOLVES NO QUESTION OF LAW NOR ANY CONFLICT WITH THE DECISIONS OF THIS COURT

Respondent, the Cleveland Electric Illuminating Company ("CEI") is wrong when it states that abuse of discretion is the only issue in this case and that: "There is no question of law involved. There is no conflict among the circuits. There is no conflict with the decisions of this Court." CEI's Brief in Opposition ("CEI Brief") at 3.

CEI compounds its error when it states: "We do not understand Petitioner's suggestion that the Court of Appeals is at fault for its failure to refer to *United States v. Stauffer Chemical Co.*, 104 S. Ct. 575 (1984) ['*Stauffer*'] and *United States v. Mendoza*, 104 S. Ct. 568 (1984) ['*Mendoza*']." CEI Brief at 10. What CEI may have overlooked is that these two decisions synthesized the entire body of collateral estoppel law and clarified the following propositions which are dispositive of the collateral estoppel issue in this case: (1) The basic distinction to be drawn in the application of the collateral estoppel doctrine is between *mutual* and *nonmutual* estoppel situations. *See*, Petition at 9, n.8; (2) In *nonmutual* situations, such as in *Mendoza*, public policy considerations require that collateral estoppel not be applied against the United States; (3) In *mutual* situations, such as in *Stauffer* and such as in the instant case (issue preclusion with respect to facts previously adjudged in litigation involving the same parties) those same public policy considerations do not prevent collateral estoppel from being applied against the United

States (and, *a fortiori*, against private litigants); and (4) In both *Stauffer* and *Mendoza*, this Court reaffirmed its holding in *Montana v. United States*, 440 U.S. 147 (1979) ("*Montana*"), that in mutual estoppel situations,

> [O]nce a court has decided an issue of fact . . . necessary to its judgment, *that decision is conclusive* in a subsequent suit based on a different cause of action involving a party to the prior litigation.

Mendoza, 104 S. Ct. at 571, citing *Montana*, 440 U.S. at 153 (emphasis added). *See also* Petition at 7-11.

In *Mendoza*, Mr. Justice Rehnquist was writing for a unanimous Court. In *Stauffer*, he was writing for eight members of this Court while Mr. Justice White filed a concurring opinion agreeing with the other Justices in the result but stating that in his view, collateral estoppel should not be applied further than that.

Since the collateral estoppel issue in this case is embraced within the reasoning of *Stauffer* and *Mendoza*, when the panel majority below made its ruling, it disregarded two unanimous decisions of this Court decided four months earlier which, if considered, would have required the opposite result. Thus, this case presents both an important question of law and a refusal by the Court of Appeals to follow existing Supreme Court precedent. These questions go far beyond a mere abuse of discretion, which CEI erroneously claims is the only issue in this case. CEI Brief at 3.[1]

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1. CEI also attempts to divert attention from the issues presented by this Petition when it argues that: "Underlying all of the claims in the case is the issue of whether CEI had a duty to aid its competitor." CEI Brief at 2. This argument is without merit in view of this Court's holding in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), that an electric utility company with market power, like every other business, is forbidden

(Continued on following page)

B. CEI ERRS IN STATING THAT IT IS IMPOSSIBLE TO KNOW WHAT THE NRC APPEAL BOARD ACTUALLY FOUND OR APPROVED

CEI disputes the City's statement that in the prior litigation between the City and CEI, the NRC's Atomic Safety & Licensing Appeal Board ("Appeal Board") resolved the overwhelming majority of the factual issues in the identical way the NRC's Atomic Safety and Licensing Board ("Licensing Board") had. CEI Brief at 4. CEI also states that "it is impossible to know . . . what facts the Appeal Board actually found or approved, specifically or otherwise." CEI Brief at 5. At the same time, CEI admitted that it had made no attempt to go through the Appendix to the City's collateral estoppel motion referencing the Licensing Board's and the Appeal Board's findings "to ascertain how many of the items which were claimed [by

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Footnote continued—

from maintaining or enhancing its market dominance by refusals to deal. Additionally, in opposing that portion of the Petition dealing with the trial court's exclusion of the Miller Stipulations, when CEI states that there is no conflict among the circuits, CEI Brief at 3, it ignores the conflicting lower court decisions on two questions: (1) the status to be accorded to First Amendment petitioning activity in the implementation of the *Pennington* evidentiary exception (*see* Petition at 20-22); and (2) whether a single lawsuit can constitute a "sham" proceeding (*see* Petition at 28-29). All of the remaining statements concerning the Miller Stipulations made by CEI in its Brief in Opposition are answered in the Petition, with one exception: It is wrong for CEI to try to create the impression at pages 10 and 11 of its Brief that the trial court's exclusion of the Miller Stipulations in this case was in harmony with Judge Huyett's ruling in *Lansdale v. Philadelphia Electric Co.*, 517 F. Supp. 218 (E.D. Pa. 1981) ("*Lansdale*"). As a matter of fact, in *Lansdale*, the plaintiff offered evidence of the defendant's activities before the Federal Energy Regulatory Commission ("FERC") as bearing on the issue of the defendant's intent. After quoting the *Pennington* evidentiary exception, Judge Huyett held: "Based upon the discussion of *Noerr-Pennington* above and the quoted language in footnote 3, I conclude that *Noerr-Pennington* would not bar the admission of FERC activities if relevant [on the issue of intent] under count I." 517 F. Supp. at 223.

the City] for collateral estoppel under the original complaint would be arguably applicable to the second amended complaint." CEI Brief at 9.

Any careful review of the Findings of Fact of the Licensing Board and the Appeal Board would demonstrate that *all* members of the Appeal Board agreed on the validity of the Licensing Board's Findings of Fact insofar as the City is seeking collateral estoppel effect.

The Appeal Board consisted of three members, one of whom, Mr. Sharfman, was assigned to write the Appeal Board's opinion. He completed the opinion but resigned from the NRC before it was issued. The other two members of the Appeal Board, Messrs. Rosenthal and Salzman, issued the decision of the Appeal Board which consisted of both Mr. Sharfman's opinion and their opinion. This decision appears in Volume 1 of the materials lodged with the Clerk of this Court (*see* Petition at 4, n.2.)

Where Messrs. Rosenthal and Salzman disagreed with Mr. Sharfman, they specifically so stated in their opinion: "We concur in its [Mr. Sharfman's opinion's] ultimate factual and legal conclusions and the result it reaches except where indicated in our separate opinion . . . ." 10 NRC 265, 270, ALAB-560 at 3. Mr. Sharfman's opinion, in turn, expressly affirmed the Findings of Fact made by the Licensing Board "except insofar as they are inconsistent with anything in this opinion . . . ." 10 NRC 265, 300, ALAB-560 at 67. Mr. Sharfman's opinion also stated:

> Certain parts of the opinion below are not discussed in this opinion at all. That is not an oversight; it simply means that we see no need to supplement or comment upon what the Licensing Board has said on the subject.

10 NRC 265, 300, ALAB-560 at 67, n.4. *See also* Circuit Judge Martin's dissenting opinion below, Slip Opinion at 26-27, App. A at A27-A28.

Two examples will suffice to show the specificity with which the Appeal Board addressed the Findings of Fact made by the Licensing Board: (1) At 10 NRC 265, 355, ALAB-560 at 187, n.242, the Appeal Board cites specifically the Licensing Board's Findings of Fact 33-63 and 201-210 dealing with CEI's single firm conduct; and (2) At 10 NRC 265, 398, ALAB-560 at 294, n.452, the Appeal Board cites specifically the Licensing Board's Findings of Fact 41-46 and 72 dealing with CEI's single firm conduct and Findings of Fact 102, 148-51 and 179-80 dealing with the single firm conduct of the other Applicants. Many other examples could be cited.

The Appendix which the City attached to its October 26, 1979 motion for collateral estoppel in the trial court (*see* Petition at 4, n.3) sets forth all of the citations where the Appeal Board resolved factual issues in the identical way the Licensing Board had. Petitioner invites the Court's attention to this Appendix which is Volume 2 of the materials lodged with the Clerk of this Court.

As can be seen from the above, the Appeal Board made it abundantly clear which factual issues it had resolved in the identical way the Licensing Board had, CEI's assertions to the contrary notwithstanding.

C. CEI ERRS IN STATING THAT THE NRC'S SUBSTANTIVE STANDARDS REPRESENT AN ADEQUATE BASIS FOR THE DENIAL OF COLLATERAL ESTOPPEL IN THIS CASE

CEI is in error when it states that it was proper for the courts below to deny collateral estoppel in this case because "[t]he legal standard applicable to the NRC proceeding is substantially different from Section 2 of the Sherman Act." CEI Brief at 6.

First, the City is not seeking collateral estoppel effect for the NRC's conclusions of law. Second, in analyzing the conduct of CEI and the other Applicants, the NRC relied on principles of the antitrust laws as interpreted by this Court and the lower courts of the United States. *See* the Licensing Board's discussion of legal standards at 5 NRC 133, 145-51. *See also* the Appeal Board's recognition of its responsibility to apply antitrust principles as developed by the federal courts. 10 NRC 265, 272, ALAB-560 at 7. Further, according collateral estoppel effect to the NRC's final *factual* adjudications under *Montana, Stauffer* and *Mendoza,* is not inappropriate just because the federal courts have exclusive jurisdiction over the City's Sherman Act claims. *Becher v. Contoure Laboratories, Inc.,* 279 U.S. 388, 391 (1929).

For support of its argument that the NRC's substantive standards justify the denial of collateral estoppel in this case, CEI cites *In the Matter of Houston Lighting and Power Co., et al.,* 10 NRC 563 (1979), *aff'd by Appeal Board,* 11 NRC 14 (1980), and *Tipler v. E.I. duPont de Nemours and Co.,* 443 F.2d 125 (6th Cir. 1971). The City submits that these cases, as well as CEI's contentions about the NRC's substantative standards, are inapposite for the reasons set forth by Circuit Judge Martin in his dissenting opinion below, Slip Opinion at 27-28, App. A at A28-A30.

D. CEI ERRS IN STATING THAT THE NRC'S PROCEDURES REPRESENT AN ADEQUATE BASIS FOR THE DENIAL OF COLLATERAL ESTOPPEL IN THIS CASE

CEI cites three procedural matters affecting the NRC antitrust review which CEI claims were different from a Section 2 monopolization case tried in a District Court. CEI asserts that "These procedural differences alone are an adequate basis for the denial of collateral estoppel." CEI Brief at 7, but CEI's claims are without foundation.

Conspiracy Case v. Single Firm Conduct: CEI states: "the proceeding before the NRC Licensing Board was a conspiracy case . . . and the conspiracy claim had an important bearing on the admissibility of evidence of the conduct of alleged co-conspirators." CEI Brief at 6-7. CEI is in error in suggesting that the NRC antitrust review "was a conspiracy case" and nothing more. Since the nuclear units to be licensed were owned by all the Applicants, the NRC necessarily reviewed both the individual conduct and the joint conduct of CEI and the other Applicants. That the Licensing Board carefully scrutinized single firm conduct, however, can be seen from that portion of the Licensing Board's opinion which commences at 5 NRC 165 entitled "INDIVIDUAL APPLICANT ACTIVITIES." For example, Findings of Fact 26-74 deal exclusively with CEI's single firm conduct. 5 NRC at 165-79. The Licensing Board used its Findings of Fact concerning the individual conduct of CEI and the others to conclude that "within the relevant product and geographic markets, Applicants *have acted individually* and collectively to eliminate one or more other electric entities and to preclude competition." 5 NRC at 255 (emphasis added). In affirming, the Appeal Board found specifically that CEI's refusal to wheel and refusal to interconnect constituted monopoli-

zation. 10 NRC 265, 327-31 and 362-69, ALAB-560 at 125-32 and 208-221. It is clear from the above that the NRC made Findings of Fact concerning CEI's conduct as a single firm and these findings were highly relevant to the City's monopolization case against CEI. The fact that there were also conspiracy claims before the NRC does not provide any justification for the rejection of the doctrine of collateral estoppel in this case.

Noerr-Pennington: CEI states: "[T]he Licensing Board refused to give any effect to the *Noerr-Pennington* doctrine, an important matter here, because, it said, one is not entitled to a government license as a matter of right." CEI Brief at 6. CEI does not point out that the Appeal Board specifically applied the *Noerr-Pennington* doctrine, rejecting the Licensing Board's implication that protected petitioning activity "either constitutes a violation of the antitrust laws or taints their [the Applicants'] other conduct with antitrust illegality." 10 NRC 265, 307, ALAB-560 at 81.

Statute of Limitations: CEI states: "The [Licensing] Board was not bound by any statute of limitations whereas the Clayton Act statute of four years applies here." CEI Brief at 6. This argument provides no basis for the rejection of collateral estoppel in this case. It is hornbook law that events which took place prior to the limitations period may be admitted in an antitrust case to show the purpose and character of other acts, and such evidence was admitted by the trial court in this case. *See also* cases cited in the Petition at 18, n.22.

The City submits that none of the "procedural differences" to which CEI has drawn attention furnishes any justification for the denial of collateral estoppel in this case.

E. CEI ERRS IN ASSERTING THAT COLLATERAL ESTOPPEL CANNOT APPLY TO THE NRC'S FINDINGS OF FACT UNLESS IT ALSO APPLIES TO AN FPC FINDING

CEI contends that collateral estoppel could not be granted to the NRC's Findings of Fact because they were contradicted by a finding of an administrative law judge at the Federal Power Commission ("FPC"). CEI Brief at 7-8. There are several reasons why CEI's contention is without merit.

In the first place, no discovery was conducted in the FPC concerning the City's allegations of anticompetitive conduct on the part of CEI. As a consequence, the full dimensions of CEI's plan of monopolization and attempt to monopolize during the years preceding the March, 1972, FPC hearing were unavailable to the City for presentation to the FPC administrative law judge. Second, the hearing held in March, 1972, could not and did not consider CEI's anticompetitive conduct during the period 1972-1975.[2] Finally, the observations of the administrative law judge concerning CEI's unfair practices were not necessary to his decision that the City should be granted an interconnection with CEI. Even the trial court in this case recognized that collateral estoppel could not be given to this finding by the FPC administrative law judge because the requirement of necessity was not satisfied. The trial court held that "a determination that defendant CEI had in fact engaged in anticompetitive practices was not an immutable prerequisite to the granting [by the FPC] of the requested relief." Order February 15, 1978, 538 F. Supp. 1227, at 1234, App. C at A52. *See also* Circuit Judge Martin's dissenting opinion below, Slip Opinion at 25-26, App. A at A26-A27.

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2. This action was instituted by the City on July 1, 1975.

There is absolutely no authority for CEI's proposition that where a court is presented with conflicting findings of fact by two administrative agencies, collateral estoppel should be applied to neither. CEI Brief at 8. Rather, this Court's holdings in *Montana, Stauffer,* and *Mendoza,* and the other authorities cited in the Petition, set the criteria for giving collateral estoppel effect in subsequent litigation between the same parties to prior adjudications of disputed factual issues. The fact that under these criteria, collateral estoppel should not be applied to the FPC's finding described above is totally and completely irrelevant to the issues in this case.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the City's Petition, Petitioner respectfully urges this Court to grant the City's petition for a writ of certiorari in this case.

Respectfully submitted,

WILLIAM B. NORRIS, *Counsel of Record*
DEBORAH A. COLEMAN
ALAN S. KOPIT
HAHN, LOESER, FREEDHEIM, DEAN & WELLMAN
800 National City E. 6th Bldg.
Cleveland, Ohio 44114
(216) 621-0150

JOHN D. MADDOX, *Director of Law*
Department of Law
City of Cleveland
Room 106, City Hall
Cleveland, Ohio 44114
(216) 664-2680
Counsel for Petitioner